
C O U N C I L C O M M U N I C A T I O N

TO : THE CITY COUNCIL
FROM: THE CITY MANAGER'S OFFICE

COUNCIL MEETING DATE
APRIL 19, 1989

SUBJECT: AUTHORIZE PURCHASE OF SCENIC OVERLOOK SITE

PREPARED BY: City Attorney

RECOMMENDED ACTION: That the Council, by **resolution**, authorize the purchase of the Scenic Overlook Site, more particularly described in Resolution No. 82-68, and further authorize the City Manager and City Clerk to execute necessary documents for such purchase.

BACKGROUND INFORMATION: In 1982, a decision was made by the City Council to dispose of a parcel of surplus City property, generally located on the south bank of the Mokelumne River east of the Southern Pacific Railroad tracks and at the north end of Awani Drive. The site, commonly referred to as the "Scenic Overlook" parcel had been previously used since 1935 as a City landfill.

The public notice and request for bids clearly identified the site as a former landfill and disclaimed any "... guarantee as to the soil conditions which may limit the feasibility of building on the property, as the areas (sic) has been used as City landfill for many years ..." It was assumed that the primary problem (as with other landfill sites) would be methane gas generated by the buried waste material.

The successful bidder for the land was Arnaiz Development Company of Stockton which **purchased** the site in late 1982 and began preparation for development as residential property. In 1988, the property (still undeveloped) was **sold** by Arnaiz to Pintail Development/Dannor Corporation of Stockton which continued to move forward with plans for residential development. A tentative map was approved in late 1988, subject to a Planning Commission condition that a Solid Waste Assessment Test (SWAT) be conducted and approval received from involved State and County agencies, including the Regional Water Quality Control Board and appropriate health agencies.

Unfortunately, elevated levels of lead and other heavy metals were found **onsite** by the soils engineering firm retained by the developer. This fact was disclosed to the Regional Water Quality Board staff, which then notified the State Department of Health Services. Neither agency will now approve the site for development, effectively halting any plans until the site is cleaned up or declared safe. You may recall that the Department of Health Services recently declared that due to budget restrictions, it had insufficient staff to conduct even routine activities such as answering telephones or responding to mail. These agencies have not told us what they would approve, but have simply affirmed that they will give no approval until something is done which meets with their approval.

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Just prior to the City's sale of the land, the Federal government adopted the Comprehensive Environmental Response Compensation and Liability Act (CERCLA), 42 USC Section 9601 et seq. Although the disclaimer in the City's request for bids might otherwise have transferred the risk and responsibility for cleanup to the buyer, CERCLA in essence makes responsibility for cleanup of hazardous or toxic substances the responsibility of the party who placed it on the land, whether or not that party still owns the land (42 USC Section 9607(a)). According to research, recent court decisions have interpreted CERCLA in such a fashion that even some hold harmless agreements have not been effective to shield prior owners from liability. This responsibility for cleanup has been applied to municipalities which own or previously owned the site involved (New York v. City of Oyster Bay 696 F.Supp. 841). It was not foreseeable at the time of sale that CERCLA would be applied and interpreted in the fashion it has over the intervening seven years, and in hindsight, the City would have been better off retaining the land.

The problem which now exists is that the developer cannot get approval from all necessary agencies to proceed with construction although it has already expended substantial sums of money. Pintail has pointed out that it may be forced by financial considerations to bring suit against the City to compel cleanup of the site, utilizing CERCLA and other State statutes such as the Porter-Cologne Act.

While I do not speculate on the owner's chances of success in such litigation, if it did succeed, the City could be responsible not only for the cleanup costs, but possibly for inverse condemnation damages for loss of use of the property, until it is declared safe for development. The estimated costs of cleanup (which at present are very speculative) range from about \$1.5 million for in place treatment, to more than \$24 million for hauling away all of the soil presently on the landfill, and replacing it with clean soil. Even if the cleanup was done immediately, the property would still belong to Pintail, which would then be free to continue with development plans, and the City would simply be out its costs with nothing else to show for it.

After extensive study and discussion among staff, the most practical option appears to be a repurchase agreement to which the present owner has indicated it is amenable. Pintail has indicated it is willing to sell the property back for the amount of out-of-pocket costs it has already invested, with no profit or markup included. Documentation has been provided showing more than \$392,000 expended to date. Pintail has agreed to accept that amount for the property, plus the interest which accrues at over \$100 per day, up to date of closing. It is estimated the total will be approximately \$395,000.

It must be stressed that I do not speculate on Pintail's chance of success in litigation, but believe this to be the most economically practical solution in the long run. The City need not and should not stipulate that the site is contaminated to the extent that there is a danger to the public, nor that it requires immediate cleanup. Tests have not shown that to be the case. However, there are some elevated levels of lead on site. A repurchase would allow the City time to make an in-depth assessment of the situation and to plan an appropriate response without the threat of a lawsuit.

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Simply defending the litigation and conducting the tests necessary to prepare the case would cost nearly as much as the repurchase. It should also be remembered that at some point, the site will have to be cleaned up or neutralized and there are no guarantees that a state or federal agency may not decide unexpectedly to require this. However, the possibility of that happening in the immediate future appears unlikely if there is no third party bringing suit to force the issue.

Because of the complexity of the environmental law issues involved, and to get another objective point of view, I consulted with Joseph Amato of San Francisco, an attorney specializing in environmental law. Mr. Amato concurred that of the options which we apparently have, repurchase appears the most practical based on potential liability for costs and also considering that following cleanup, the City will again have a desirable piece of property for which an appropriate use may be found.

The present owner has requested a prompt decision by the Council because interest and carrying charges continue to accrue.

Respectfully submitted,



BOB McNATT
City Attorney

BM:vc

SCENICOV. 5/TXTA.01V

RESOLUTION NO. 89-46

A RESOLUTION OF THE LODI CITY COUNCIL
AUTHORIZING THE PURCHASE BY THE CITY OF LODI OF REAL PROPERTY
LOCATED ON THE SOUTH BANK OF THE MOKELUMNE RIVER

BE IT RESOLVED BY THE LODI CITY COUNCIL, that the City Manager and City Clerk are authorized to execute the necessary documents for the purchase by the City of Lodi of real property generally referred to as the "Scenic Overlook" site, and more particularly described as:

That certain real property situated in the State of California, County of San Joaquin, City of Lodi, described as follows-

PARCEL ONE:

A portion of the southeast quarter (SE 1/4) of Section Thirty-Six (36), Township Four (4) North, Range Six (6) East, Mount Diablo Base and Meridian, according to the Official Plat thereof, described as follows:

Beginning at the northwest corner of Lot Thirty-Five (35) of Mokelumne Village as filed for record September 26, 1978 in Volume 23, page 95, San Joaquin County Records; thence North 82 Degrees, 21 Minutes East, 101.32 feet to the Northeast corner of said Lot Thirty-Five (35); thence 12.75 feet along a nontangent curve, concave to the southwest said corner having a radius of 50.00 feet, and a long chord which bears North 34 degrees, 38 Minutes, 23 Seconds West; thence 136.97 feet along a reversing curve to the right, said curve having a radius of 50.00 feet, and a long chord which bears North 36 Degrees, 31 Minutes, 48 Seconds East; thence North 3 Degrees, 00 Minutes West to the point of intersection with the south bank of the Mokelumne River; thence northerly and westerly along said south bank to the point of intersection with the Southern Pacific Company right of way; thence South 3 Degrees, 00 Minutes East along said right of way to a point which bears South 82 Degrees, 21 Minutes West from the northwest corner of the above described Lot Thirty-Five (35); thence North 82 Degrees, 21 Minutes East, 27.43 feet to the point of beginning.

PARCEL TWO:

A portion of the southeast quarter (SE 1/4) of Section Thirty-Six (36), Township Four (4) North, Range Six (6) East, Mount Diablo Base and Meridian, according to the Official Plat thereof, more particularly described as follows:

Beginning at the Southeast corner of the City of Lodi property as described in Book "A" of Deeds, Volume 266, at Page 3, San Joaquin County Records; thence South 82 Degrees, 21 Minutes West, 55.88 feet to a point on a curve, said point also being the Northeast corner of Lot Thirty-Five (35) of Mokelumne Village, as filed in Book 23 of Maps and Plat, at Page 95, San Joaquin County Records; thence continuing northwesterly along said curve, having a radius of 50 feet, a central angle of 14 degrees, 36 Minutes, 50 Seconds, and an arc length of 12.75 feet to a point of reverse curvature; thence along a curve to the right having a radius of 50 feet, a central angle of 156 Degrees, 57 Minutes, 12 Seconds and arc length of 136.95 feet to the East line of said City of Lodi property above described; thence South 3 Degrees, 00 Minutes East, 81.87 feet to the point of beginning.

Excepting from Parcels One (1) and Two (2) above, all oil, coal, or other minerals in the land, and the right to prospect for, mine, and remove the same under such rules and regulations as the Secretary of the Interior may prescribe as reserved in the Grant by the United States of America to Central Pacific Railroad Company by an Act of Congress approved July 1, 1862, and as reserved in that certain document recorded December 21, 1978 in Book 4490, Page 76, San Joaquin County Records, lying within the 400 foot wide Congressional Railroad Right of Way.

PARCEL THREE:

A portion of the Southeast Quarter (SE 1/4) of Section Thirty-Six (36), Township Four (4) North, Range Six (6) East, Mount Diablo Base and Meridian and a portion of Tract No. 1444, Mokelumne Village, filed for record September 26, 1978 in Book 23 of Maps and Plats, Page 95, being more particularly described as follows:

Parcel K of Parcel Map filed for record June 13, 1984 in Book 12 of Parcel Maps, at Page 179, San Joaquin County Records.

Except therefrom all oil, oil rights, mineral rights, natural gas rights and other hydrocarbons by whatsoever name known, together with all geothermal steam and steam power, etc., together with the right of storing in, or removing the same from said land, as described in deed to Eastwood Minerals and Energy Company, a California Corporation, recorded July 22, 1974, in Book 3894, Page 233, San Joaquin County Records.

NOTE: Eastwood Minerals and Energy Company, a California Corporation quitclaimed their right to drill, mine, store, explore and operate through or on, and utilize, all or any portion of the surface of the upper 500 feet of the subsurface of the herein described land by deed recorded May 19, 1978 in Book 4400, Page 174, San Joaquin County Records.

for the total purchase price of \$395,785.23, including escrow fees and charges, as of Friday April 21, 1989, the anticipated closing date.

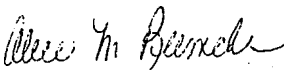
Dated: April 19, 1989

I hereby certify that Resolution No. 89-46 was passed and adopted by the City Council of the City of Lodi in a regular meeting held April 19, 1989 by the following vote:

Ayes : Council Members - Hinchman, Olson, Reid, Pinkerton and Snider (Mayor)

Noes : Council Members - None

Absent: Council Members - None


Alice M. Reimche
City Clerk